



May 17, 2011

Testimony of Todd A. Heywood Senior Reporter, Michigan Messenger

Before the House Government Oversight, Ethics and Reform Committee

Good afternoon Chairman McMillin and Committee members.

My name is Todd A. Heywood and I am the senior reporter for Michigan Messenger. Michigan Messenger is an online news and policy website published by the American Independent News Network. AINN is a not-for-profit news agency based in Washington, D.C. AINN is a not-for-profit news agency based in Washington, D.C. that publishes news websites staffed with reporters based in Colorado, Minnesota, Iowa, Florida, New Mexico and Texas, as well as Michigan. While those states constitute the majority of the network's focus, we have covered political and policy issues in states throughout the country.

I have been a reporter off and on since 1989, publishing in a variety of media outlets, as well as working in print, online and television news. I also served as a Lansing Community College Trustee from 2001-2003 -- so when I talk about Michigan's Freedom of Information Act I have the unique experience to know what the process looks like on both sides of a request.

Government, as we know, operates best in the disinfectant of sunlight. Preventing the release of government work product should happen only in narrowly, well-defined situations wherein national security or the safety of persons would be imperiled with the release of that information.

Michigan's Freedom of Information Act was originally designed to do just this. Sadly, the law has been so stretched, twisted and contorted, that the original intent to air on the side of narrow interpretation of exclusions has been lost. Worse, we have found that public bodies have determined that in situations where they have no interest in releasing public documents, that providing an outrageous cost to produce the documents is assigned.

In fact, sources at several public bodies have told me off the record that the public bodies specifically create exorbitant costs for production of public documents to purposely prevent the release of the documents.

As you might imagine, as a not-for-profit news agency operating in today's difficult economy, every penny counts; and most public bodies know this. As a result, when we request public documents which could be controversial, we have found that public bodies produce outrageous costs estimates and then when and if those costs are met, they often produce ridiculously

documents. Those documents are often littered with improper and illegal redactions which obscure and hide information to which the public has an important need.

Chairman McMillin asked me to testify today about a nine month battle we had with Michigan State University over the release of police reports of an alleged sexual assault which occurred at the end of Aug. 2010 in an MSU dorm. The assault was allegedly perpetrated by two high profile MSU basketball players.

We are also aware of an ongoing battle between MSU administration officials and the National Coalition Against Violent Athletes which has a very similar set of problems and behaviors as I will note about our battle. NVACA requested administrative communications about this alleged sexual assault, and received an outrageous cost assessment of over \$700 to produce those documents. NCAVA paid the good faith deposit, and MSU produced a stack of documents which were heavily redacted. Administrative sources had produced some of the redacted emails, which clearly showed MSU had improperly and illegally redacted information from that request-- exactly what happened with the police reports we requested. I have attached NCAVA's appeal and original letter to my written testimony for you review.

I should note that additional requests for information related to this assault and similar crimes were estimated by MSU to cost Michigan Messenger thousands of dollars. Those requests were substantially similar to those made by NCAVA and thus we chose not to pursue appeals on those 'constructive denials.'

Michigan Messenger recently completed a similar battle with MSU over the release of the police report in this sexual assault case. I submitted a request to both Michigan State University and the Ingham County Prosecutor's office on or about Sept. 14. The requests were substantially similar and sought copies of the police reports in this case.

Ingham County Prosecutor Stuart Dunnings III released the documents without any hassle. And in fact following our publication of a story based on that police report, Mr. Dunnings in the spirit of transparency released additional information on his website. This additional information included transcripts of the police interviews with the victim as well as one of the two alleged perpetrators.

Mr. Dunnings should be praised for his adherence to the idea of transparency in government. Mr. Dunnings' releases can be found here:

<http://www.ingham.org/PA/PDF/Press%20Release%20SJD.pdf>.

On the other hand, MSU replied to Michigan Messenger seeking \$120 to release the police report. That response was on Sept. 22, after ICPO had released the documents in question. On Jan. 10, 2011, Michigan Messenger filed an appeal to this cost assessment. On Jan. 20, MSU responded to our appeal, and released the requested police report.

However, the released police reports from the January appeal was so heavily redacted by MSU as to be useless in informing the public about what allegedly happened in that dorm room in late August. Surely, the public has a right to know exactly what was alleged to have occurred, and who said what. Particularly in this case wherein the alleged perpetrator supported much of the the victim's statement.

As a result of this release, I prepared this document showing a side by side comparison between MSU's police report release and the ICPO release. As you can tell, MSU went out of its way to illegally and improperly redact information which is clearly not exempted information.

On March 7, Michigan Messenger again appealed the decision by MSU to release the heavily redacted police report, and specifically noted that information was illegally and improperly redacted by the university. MSU responded by seeking an extension for 10 days, specifically because President Simon was travelling. Ironically, she was travelling on business for the NCAA on whose board she serves. She was not out of contact and should have had email access during her travels.

While MSU agreed to release the documents in question with similar redactions as had been found in the prosecutor's release -- it took them a month to do so. The agreement to release the documents was made on March 21, 2011. However, the actual documents were not made available to Michigan Messenger until April 22, 2011.

Here is what MSU finally released.

This case is a perfect example of what Charles Davis, a professor of Journalism at the University of Missouri School of Journalism and former executive director of the National Freedom of Information Coalition, calls "economic stonewalling."

This incident with MSU is not an uncommon occurrence with the university, or, sadly, with other public bodies in the state. These obscene cost estimates and redaction games are too common, and they damage not only the ability of the media to remain a check and balance to the action and activities of public bodies, but they also shed significant doubt on the honesty, integrity and ability of public bodies to be transparent.

In this situation, MSU was able to charge these fee because they have appointed a highly paid attorney as the FOIA coordinator, making them the lowest paid employee eligible to review and redact the documents in question. Public bodies are doing this more and more often. By putting an attorney between public information and the public, the public body can hide information which from the public.

To address this issue, among many others, Michigan Messenger, the American Independent News Network and our partners in the state recommend the following changes to Michigan's FOIA law:

1. Public bodies must be directed to stop using highly paid attorneys to act as an economic buffer between the public's need to know and the public bodies documents.
2. The state must clarify and define what the "public interest" exemption in the law to waive costs actually means. Right now, public bodies ignore this exemption, even when it is pointed out and sought when specific documents would in fact be in the public's interest. It is difficult to argue that the details of a violent sexual assault on a public university campus IS in the public's interest. Particularly when the alleged perpetrators are limited public figures and criminal charges were never issued.

3. The state must clarify that state universities and colleges are subject to FOIA. There is a case I am aware of which is working its way through the courts which could determine that state universities are not subject to the law. This would create a terrible prohibition on the ability of news outlets and citizens to create the necessary transparency and check and balance on tax payer funded public bodies.

4. The state legislature must lead by example. That means they must extend FOIA to include their own offices and committees as well as the governor's office. Those bodies are currently exempt. It is noxious at best to allow that kind of exemption while dictating more transparency for every other public body in the state.

5. The state legislature must clarify Michigan's law to make sure that new forms of communication are covered under FOIA. As you are likely aware this is in jeopardy based on a Court of Appeals ruling last summer which found e-mails were not covered by the law. This is a threat to transparency and accountability, and needs to be urgently addressed by this legislature.

6. The legislature should re-visit the exemptions and loopholes that decades of attorney general rulings and court rulings have created. Those exemptions should be weighed to provide the highest level of transparency as possible.

7. This legislature must address loopholes which could allow for the release of private medical information contained in public documents.

Thank you for asking me to testify today, and I will be happy to answer any questions the committee may have.

MICHIGAN STATE
UNIVERSITY

September 22, 2010

FOIA FEE & DEPOSIT NOTICE
via e-mail as pdf

Mr. Todd A. Heywood
Reporter
The Michigan Messenger
Heywood.Reporter@gmail.com

Dear Mr. Heywood:

This is written with regard to your September 14, 2010 Freedom of Information Act (FOIA) request that you sent to the MSU Police Department. Please note that all FOIA requests received by the University are processed by this Office and not the individual administrative unit. Any future FOIA requests or correspondences should be directed to this Office.

Based upon our preliminary inquiries, we estimate that gathering the records responsive to your request and separating information exempt from disclosure from that which is not exempt is likely to incur more than \$120.00 in labor fees. This serves as an estimate only and does not guarantee or limit the final, total fees which may be assessed. Please also be advised that substantive withholdings may be made under the privacy exception of the Michigan Freedom of Information Act (MIFOIA). Regardless of any withholdings, you will be assessed all labor fees incurred. Therefore, pursuant to Section 4(2) of MIFOIA, we require that you remit a deposit prior to our processing your request.

If you wish to pursue the processing of your request and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$60.00 to the Freedom of Information Act Office, 117 Olds Hall, or notify us in writing if you wish to modify or withdraw your request. The University will not process your request until the deposit is received by our Office.

Sincerely,



Radhika Pasricha
Freedom of Information Act Officer

S
FREEDOM OF
INFORMATION ACT
OFFICE

Michigan State University
117 Olds Hall
East Lansing, MI
48824-1046
517/353-3929
Fax: 517/353-1794

FOIA Fee* Estimate Calculation Worksheet - FOIA I.D.: F189.10/HEYWOOD

(Name) and/or Classification	Annual Salary	÷ 2080 = hourly wage	# of Hours	x Hourly Rate = Labor Charge
Asst. FOIA Officer** APA 12	40,855.00	19.64	5.00	98.20
Sergeant I, MSUPD FOP Records Division record collection	61,616.00	29.62	1.00	29.62
TOTAL LABOR FEES ESTIMATE				127.82

**Review of records and separation of information exempt from disclosure from that which is non-exempt at approximately 4 mins./page;
~ 80 pp. = 320 mins. = 5.0+ hours.

No cost per copy assessed.

*See May 1998 MSU FOIA Fees schedule

Ingham County Released Document

VICTIM'S DESCRIPTION OF THE SEXUAL ASSAULT:

After [REDACTED] shut off the lights to the room, [REDACTED] who was standing a very short distance from [REDACTED], said, "c'mon, take it all off." [REDACTED] stated she was afraid for her safety if she did not and began removing her clothing. [REDACTED] removed all her clothing until she was topless and wearing only her thong underwear.

[REDACTED] said she was approached by both [REDACTED] and [REDACTED] who pulled down and removed her underwear. Because of the darkness, victim [REDACTED] was unsure which suspect then grabbed her forearm and pulled her to the ground, forcing her to lie on her back. The suspect who pulled her to the ground then laid on top of her inserted his penis into her vagina and began engaging in vaginal sexual intercourse with [REDACTED]. She advised the second suspect stood off to the side, grabbed her hand and placed it onto his penis.

The victim stated that the suspects took turns sexually assaulting her in various sexual positions and orifices. She explained she was moved and manipulated by suspects to accommodate different sexual positions. She stated the suspects performed several different sex acts, but did not recall the exact order in which they occurred. Below is a summary of each sex act [REDACTED] recalled.

- At one point, one suspect was seated on a desk chair facing the victim. [REDACTED] stated the other suspect stood behind her and pushed her forward toward the suspect seated on the chair. [REDACTED] stated she was forced to sit onto one suspect's lap and his penis was inserted in her vagina. They engaged in sexual intercourse for an unknown period of time.
- The suspects forced the victim onto her knees. One suspect approached from behind and inserted his penis in her vagina. The other suspect approached the victim from the front and [REDACTED] stated the

MSU Released Document

VICTIM'S DESCRIPTION OF THE SEXUAL ASSAULT:

[REDACTED] stated she [REDACTED]

[REDACTED] said she was [REDACTED] victim [REDACTED] was [REDACTED] suspect [REDACTED] The [REDACTED] She advised the second suspect [REDACTED]

The victim stated that the suspects [REDACTED] She explained she was [REDACTED] She stated the suspects but did not recall [REDACTED] Below is a summary of each [REDACTED] recalled.

- At one point, [REDACTED] stated the other suspect [REDACTED] stated she was [REDACTED] They [REDACTED]
- The suspects [REDACTED] One suspect [REDACTED] The other suspect [REDACTED] stated the

<p>other suspect forced his penis into her mouth and said "suck it." [REDACTED] was unsure which suspect was which. They engaged in this sexual act for an unknown period of time.</p> <ul style="list-style-type: none"> • The suspects bent the victim over an ottoman in the room and inserted their penises in her vagina from behind. The suspects took turns sexually assaulting over the ottoman. [REDACTED] was sexually assaulted for an unknown period of time. • The victim stated one of the suspects inserted their penis into her anus and engaged in anal sex for an unknown period of time. 	<p>other suspect [REDACTED] [REDACTED] was unsure [REDACTED] They [REDACTED]</p> <ul style="list-style-type: none"> • The suspects [REDACTED] [REDACTED] The suspects [REDACTED] [REDACTED] was [REDACTED] • The victim stated one of the suspects [REDACTED] [REDACTED]
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FIG 1.1: Sample Section Example 1 comparison MSU released police report and Ingham County Prosecutor's version of document release.

Ingham County Released Document

At approximately 2:30 a.m. on August 31st Detective Simi and I interviewed [REDACTED] in this department's interview room. The interview was recorded visually and with audio. A copy of this interview has been provided on disc to the prosecuting attorney's office for review. I advised [REDACTED] that he was not under arrest and was free to leave at any time. Without preempting facts, [REDACTED] stated that he met a girl the night before that both [REDACTED] and he had sex with. [REDACTED] could not identify the girl by name however provided a limited physical description. [REDACTED] stated that he and [REDACTED] had this girl alone with them in their room. [REDACTED] stated that they played a 'game of hoop' and began taking their clothing off. [REDACTED] stated that both he and [REDACTED] had sex with the girl. [REDACTED] stated that at some point in the sexual interactions he understood 'the girl' to be reluctant and indicating that she did not want to continue having sex with either of them. [REDACTED] stated that when she stated "I don't want this"... he no longer had sex with her. [REDACTED] stated that [REDACTED] continued to have sex with this girl—despite her reluctance and statements that she did not want to continue. [REDACTED] stated that he had vaginal sex with her and that he did not have anal sex or oral sex with her. [REDACTED] stated that he had used three condoms in total and only ejaculated in one of the three. [REDACTED] stated that [REDACTED] did not use a condom during sex at first but then did use at least one condom that he was aware of. Xxxx stated that he was concerned over the girl's reaction to the circumstances. [REDACTED] stated that she seemed "timid" and "not aggressive." [REDACTED] stated that he could understand how she would feel that she was not free to leave. [REDACTED] stated that the girl seemed to want to leave while making comments that she thought they were "bigger" than her — [REDACTED] stated that he understood that she did not feel she could leave. [REDACTED] stated that when the girl said she "was done" he no longer had sex with her. However, [REDACTED] indicated that [REDACTED] "coaxed" her into continuing to have sex with him. [REDACTED] stated

MSU Released Document

At approximately 2:30 a.m. on August 31st Detective Simi and I interviewed [REDACTED] in this department's interview room. The interview was recorded visually and with audio. A copy of this interview has been provided on disc to the prosecuting attorney's office for review. I advised [REDACTED] that he was not under arrest and was free to leave at any time. Without preempting facts, [REDACTED] stated [REDACTED] could not [REDACTED] however provided [REDACTED] stated [REDACTED] stated that they [REDACTED] stated that [REDACTED] stated that at some point [REDACTED] stated that [REDACTED] stated that [REDACTED] stated that [REDACTED] stated that he had [REDACTED] in total [REDACTED] stated that [REDACTED] but then did [REDACTED] that he was aware of. [REDACTED] stated that [REDACTED] stated that he could [REDACTED] stated that [REDACTED] stated that he [REDACTED] stated that [REDACTED] stated that he understood that [REDACTED] stated that [REDACTED] However, [REDACTED] indicated that [REDACTED] stated

<p>that he asked [REDACTED] to apologize to her. [REDACTED] stated that he apologized to her. [REDACTED] stated that he apologized because it seemed she felt they "disrespected" her. [REDACTED] stated that the girl seemed more upset with [REDACTED] than him. [REDACTED] stated that he thought about contacting her the next day to apologize again but could not remember her name nor any address. [REDACTED] stated that he did not intend to tell [REDACTED] that he was going to make an additional apology to her.</p>	<p>that he [REDACTED] stated that [REDACTED] stated that he apologized because it seemed she felt they "disrespected" her. [REDACTED] stated that [REDACTED] stated that he thought about [REDACTED] [REDACTED] stated that [REDACTED] that [REDACTED]</p>
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FIG 1.2 Sample Section Example 1 comparison MSU released police report and Ingham County Prosecutor's version of document release.

From the Interview with Suspect

Ingham County Released Document	MSU Released Document
<p>[REDACTED] and just chill And then [REDACTED] invited her to come, and I was just coming back, So I just walked back with them, So we was just, coming back to the room, or whatever So when we walked back to the room, or whatever, we was Just chillin'. But they was playing basketball, shooting on the rim And, um, we started playing . we was playing a game, or whatever. And she was, like, Love & Basketball. Like, "You miss a shot, you take something off ." or whatever, so we playing that. So .. and then, turn, we started. you know. doing whatever And then she was, like -- it got to a pOint where she was. like. she done. or whatever, and then she wanted to stop. or whatever. And then, like. she _ . I like, . lked her into it , or whatever, and she Just went along with it, whatever. Like. she didn't · · I mean, she said -. she just said, "Stop" she done. So she . xxxxx let her up, and everything. So they sitting there talking like this standing up. I mean, she could have she could left. whatever. She started put t ing on her clothes. and just xxxxx- - " just started talking to her, or whatever. So then she, like, "All r ight . " So she Just she let him go again, and then they started going. or whatever. And then. I mean, she was, like _ . he done -- he was done, or whatever. He got done whatever he was doing. And, like, when I was going, like, I stop when she said stop. Just everything. Just how is this done?</p>	

And then. I mean, she first at first, she was, like, he wasn't using a condom, and I was .. I used .. I used I strapped up. I had three of them. and then he put on one. I don't know if he took it off when they was going or not. But. I mean, she was, like. "You've got to have on a condom," after the first time. So .. so, whatever. He put on a condom, and then she went when he got done, he left. He left out the room. Then he went back into the bathroom, and she was getting dressed, whatever. And, um .. and then she got dressed, and I was still in the room with her. I was putting on my shorts. So she got dressed, and I'm, like _ . then she was -- she was, like, she had some kind of -- like, the way she was talking, saying, like, she was fed up, or whatever, so I was, like. "Are you alright," or whatever. And she was, like. "Naw, you just .." she, like, "Yo friend just, like, used me," or whatever, like, whatever. She started saying all this. And I'm, like, "So what you saying" And she was, like .. she just felt like he disrespected her. And then. I mean -- but I see where she was coming from when ,u she said she couldn't .. like, the tone of her voice was . like. she was done. But then he talked her into it. and she Just let him go. So. I mean. I don't really. I mean, see so, like. I guess he talked her into it. but she _ . she could have stopped. So now I'm talking to her, or whatever. and shes, like. "Well ." I'm, like. "You could have just left," or whatever. And she was, like -- like. "Well. y'all too big," and all this. And, I mean, "I wasn't going to make you stay there" because, I mean, like, if she wanted to leave, she could have left because, I mean. I wasn't going to make her stay there because I already know I don't want none of this. I don't want none of this happening because I got too much to lose. and I'm just trying to go to the~ or whatever. So I'm like .. I was. like -- I mean. I told her. like. I mean. "You could have left, if you felt like you was uncomfortable and everything." So she was, like, "But y'all big and stronger than me." I was, like. I just didn't even I Just avoided that. like, well .- I'm, like .- I just

<p>let her know, like. I "You could have left." So then she got dressed. She. like. I'm, like, 'Well, I apologize if you feel like anybody used you. and all this." I apologized to her, like. She was, like. "Well, you all right. You did -- like, you stopped. You did everything you was straight." I'm, like, "All right", and then .. she was, like, "But yo friend, he just , like _." She was .. like, she wasn't feeling him. Like, she was, like, he disrespected her, and all that. So, I mean, I'm, like -- I mean, "I can go get him and everything and tell him. like -- tell him to apologize and tell him where you coming from, and all that." So I was, like, "Man, open up the bathroom." He. like, "Man. I'm about to get in the shower. I'm about to get in the shower." So i'm, like, "Dude, let me in the bathroom so I can talk to you. This is serious. She out here feeling like, like you used her and everything. She talking about all this." And so I'm, like, "All right ." So he let me In. So I'm, like, "Dude, you know you gotta go out here and apologize to her because she feel like you used her and everything. Like, she wasn't -- like, she didn't like It." So i'm, like. "Dude. you need to come out here, apologize to her and mean it. for real" So he. like -- he was, like, he didn't want to, but I'm, like. "Man, you need to do this for real" And I'm, like, "You got too much to lose." and all that. So he go out there. and he talk to her like he's. like. 'Well. I'm sorry," but he's. like like, he didn't want to say it, but then he said it anyway. I'm, like, "Dude, you need to Just. like _" I Just flat out told him, "Like. Dog, you just need to fucking say what you got to say, and just get i t over with. Quit trying to beat around the bush Apologize to her.</p>	
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FIG 2.1 Sample Section Example 1 comparison MSU released police report and Ingham County Prosecutor's version of document release.

The document from MSU of this transcript DOES NOT match the transcript released by Prosecutor Dunnings. Apparently, the University changed language to make the suspect appear to speak proper English. As such it is impossible to do a section to section comparison between the two documents.

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OF COUNSEL

January 7, 2011

VIA E-MAIL and FIRST CLASS MAIL

Joel I. Furguson, Chairman
Michigan State University Board of Trustees
1223 Turner, Suite 300
Lansing, MI 48906

RE: *The Michigan Messenger's September 14, 2010 Freedom of Information Act
Request Appeal from Functional Denial on September 22, 2010*

Dear Freedom of Information Act Office:

The undersigned represents the Michigan Messenger. Pursuant to MCL 15.240, this is an appeal of Michigan State University's Freedom of Information Act Office's ("MSU FOIA Office") response to the Michigan Messenger's Freedom of Information Act (FOIA) request from September 14, 2010. *See* MCL 15.231, *et seq.*

Background

On or about September 14, 2010, representatives of the Michigan Messenger sent the MSU FOIA Office a request for a police report involving sexual assault that took place on or about the dates of August 29 and 30 2010. Specifically, the victim alleged that two persons sexually assaulted her and that the assault took place in the dorm room of one of the alleged perpetrators.

On or around September 22, 2010, our client, the Michigan Messenger, received a letter from Freedom of Information Act Officer Radhika Pasricha indicating that the estimated cost of gathering the records responsive to its request and separating information exempt from disclosure from that which is not exempt is likely to incur more than \$120.00 in labor fees, plus any additional costs. The MSU FOIA Office provided a breakdown of the charges indicating that review and separation of exempt information by the Assistant FOIA Officer (APA 12) would cost \$98.20 for five hours of work and the MSUPD Sergeant would take one hour in order to separate said documents at a cost of \$29.62.

To be clear, your letter did not claim that the information sought by Michigan Messenger did not exist or that it fell within any of the statutory exemptions outlined in Section 243 of the Act. However, given the nature of the quoted costs, we have treated your September 22, 2010 response as a constructive denial and hereby appeal that denial. *Detroit Free Press Inc v Dept of Atty Gen*, 271 Mich App 418, 772 NW2d 277, (2006) (Plaintiff alleged that attorney general "constructively denied"

Joel I. Furguson, Chairman
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FOIA request by imposing unjustifiable labor costs).

Based on subsequent information we have received and a review of the plain language of the statute, we believe that these costs are unjustifiably excessive and inconsistent with the Michigan FOIA which encourages public bodies to fully disclose important public information at minimal cost to the individual or entity making the request. *See, Swickard v Wayne County Medical Examiner*, 247 Mich App 124, 635 NW2d 335 (2001) (characterizing the FOIA as a "pro disclosure" statute). Therefore, we request that MSU reconsider its decision to require Michigan Messenger to pay the costs quoted in September 22, 2010, letter.

Requirements of the Michigan Freedom of Information Act

Under Michigan law, in responding to a FOIA request, a public body may not charge more than the hourly wage of the lowest paid public employee *capable* of retrieving the information necessary to comply with a request. § 15.234(3) (emphasis added). The fees the public body charges must be uniform and not dependent upon the identity of the requesting person. *Id.* Moreover, a public body must use the most economical means available for making copies of public records. *Id.*

Furthermore, a public body must not charge for the *cost of search, examination, review, and the deletion and separation* of exempt from nonexempt information unless failure to charge a fee would result in *unreasonably* high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. *Id.* (emphasis added). "Unreasonably high costs" are those costs that are "excessive and beyond the normal or usual amount for those services." 14 OAG, 2001, No 7083, p 20 (June 7, 2001).

In essence, the FOIA contemplates only a *reimbursement* to the public body for the cost incurred in honoring a given request—nothing more, nothing less. *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 130; 454 NW2d 171 (1990). FOIA also contemplates that any fees associated with producing a public record may be waived or reduced if the information sought is in the public interest. MCL 15.234(1).

The Excessive Nature of the Quoted Costs

In this case, it appears that your office will not be using the services of the lowest paid employee *capable* of fulfilling the request, as required by the Act. As we understand it, the actual police report consists of approximately fourteen pages. In order to facilitate the request, your office would need only remove any identifying information in order to preserve the anonymity of the accused and the accuser. We believe that this routine task could be carried out by a person other than your Assistant FOIA Officer.

Joel I. Furguson, Chairman
January 7, 2011
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Further, your breakdown of the fees associated with fulfilling the request appears to grossly overstate the volume of documents involved. Your FOIA Fee Estimate Calculation Worksheet indicates that your FOIA Officer would have to review and separate information contained in 80 pages. However, the actual police report is only fourteen pages.

Your quotation of the fees associated with producing the public record also appears to turn the statutory scheme on its head. In justifying the \$120.00 cost figure, your office stated that it would take your Assistant FOIA Officer five hours at \$19.64 per hour to separate exempt information from non-exempt information. Your Fee Worksheet also indicated that the MSUPD Sergeant would require one hour at \$29.62 per hour in order to fulfill the request. However, your office also indicated that it would waive the copying costs associated with fulfilling this request.

Your intention to charge for the separation of information but not for the copying of the information is completely at odds with the Act's clear statutory language. *See Detroit Free Press, supra* at 423 (trial court ruled that imposed labor costs were not supported by Section 4 of the Act). As we noted above, the statute clearly states that a "fee shall not be charged for the cost of search, examination, review and the deletion and separation from nonexempt information . . . unless failure to charge a fee would result in unreasonably high costs to the public body [because of the nature of the request.]" MCL 15.234(3). The statute allows a public body to charge for the incremental costs of copying or publishing a public record. MCL 15.234(1). Your fee estimation, however, disregards the statutory scheme and elevates the costs of review and separation over the incremental costs of copying and producing the requested document. Where the statute expressly forbids charging for the review and separation of information *unless* the public body can show that a failure to charge would result in unreasonably high costs, we do not believe that your quoted costs can be justified. *See* MCL 15.234(1) and (3).

We are confident that your office cannot show that production of the police report would result in unreasonably high costs as required by the statute because Michigan Messenger obtained the police report from another public body free of charge. We therefore find it difficult to reconcile how your office can justify charging \$120.00 to produce a document that another public body has produced without cost.

Finally, our client continues to believe that the requested information falls within the public interest provision of the FOIA. MCL 15.234(1). The allegations in the police report are of serious public safety concern to the MSU community regardless of whether or not the prosecutor has decided to press charges. We therefore request that the MSU FOIA Office provide this information at no cost or at a reduced cost that can be justified within the terms of the statute.

Joel I. Furguson, Chairman

January 7, 2011

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As the FOIA provides, we expect to receive a reply to this administrative appeal letter within ten days.

Very truly yours,

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cc: Todd Heywood, Reporter, The Michigan Messenger
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